Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

CHECKRITE LTD., INC.,

Petitioner,

v.

SHAROLYN CHARLES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the lower court err when it found that a "debt" covered by the provisions of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692a *et seq.*, arose from an exchange where the obligee did not agree to extend credit, had no expectation of being owed money at the conclusion of the exchange, and did not agree to defer payment?

PARTIES TO THE PROCEEDING

Appellant in the underlying appeal was Sharolyn Charles.

The appellees in the underlying appeal were Check-Rite Ltd., Inc., Alvin R. Lundgren, and Lundgren & Associates.

The following are parent companies or nonwholly owned subsidiaries of CheckRite Ltd., Inc.: Data Broadcasting System, Broadcast International, Inc., CheckRite International, Inc.

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BASIS FOR JURISDICTION

The order of the Ninth Circuit Court of Appeals that is the subject of this petition was filed on July 8, 1997. CheckRite filed a petition for rehearing, which was denied on August 8, 1997. *See* Appendix. This Court has jurisdiction to review the order of the Ninth Circuit on a writ of certiorari pursuant to 28 U.S.C. § 2101(c).

STATUTES AT ISSUE

The Fair Debt Collection Practices Act, 15 U.S.C. § 1692a *et seq.* ("FDCPA") is generally at issue, although the particular section of the FDCPA that has been interpreted and applied by the courts to resolve the issue in this petition is section 1692a(5).

> (5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

STATEMENT OF THE CASE

On or about July 4, 1995, plaintiff Sharolyn Charles wrote a check in the amount of $17.93 to Poncho's #75, a restaurant in the Phoenix, Arizona area. Shortly thereafter, Charles' bank dishonored her check. Poncho's forwarded the returned check to CheckRite, Ltd. to pursue

collection. CheckRite sent notices to Charles seeking payment of the check amount and a service fee. Charles ignored these. CheckRite then retained Alvin R. Lundgren of Lundgren & Associates, who sent a settlement offer to Charles. Ultimately, Charles rejected the settlement offer and forwarded to Lundgren a money order only in the amount of the original check, $17.93. This was not accepted.

On October 19, 1995, Charles filed her complaint alleging that the conduct of CheckRite and Mr. Lundgren violated the FDCPA. CheckRite and Lundgren moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), citing a decision of the United States Court of Appeals for the Third Circuit for the proposition that the FDCPA does not apply to efforts to collect dishonored checks because obligations to make good on a dishonored check do not arise out of consumer credit transactions. The United States District Court for the District of Arizona granted that motion. *See* Appendix.

Charles appealed to the United States Court of Appeals for the Ninth Circuit, which reversed on July 8, 1997, wholly adopting the rationale of the majority in a recent split decision of the United States Court of Appeals for the Seventh Circuit, which decision was issued after briefing in this case was complete. Because the Ninth Circuit based its decision entirely upon, and wholesale adopted the rationale of the Seventh Circuit panel's majority, CheckRite petitioned the Ninth Circuit for rehearing, this being CheckRite's first opportunity to identify for the Ninth Circuit the inconsistent points about the Seventh Circuit decision. That petition was denied on August 8, 1997, without opinion.

Federal jurisdiction in the court of first instance was pursuant to 28 U.S. C. § 1331, and 15 U.S.C. § 1692a *et seq.*

REASONS FOR GRANTING THE WRIT

I. THE CIRCUIT COURTS ARE IN CONFLICT ABOUT WHETHER THE FDCPA APPLIES TO NON-CREDIT TRANSACTIONS.

This Court should grant CheckRite's petition for writ of certiorari to resolve a conflict among the circuit courts concerning the scope of the FDCPA, a federal statute that has potential application to millions of consumers and merchants each day. Congress enacted the FDCPA as an amendment to the Consumer Credit Protection Act, for the purpose of providing a remedy to consumers who have been subjected to abusive, deceptive, and unfair debt collection practices by debt collectors. Consumers who are aggrieved by such practices may sue to recover damages as well as attorney's fees and costs. However, Congress did not include all obligations to pay within the protections of the FDCPA, but only those that fit within the FDCPA's definition of "debt." That definition has been the subject of numerous and conflicting interpretations in the federal courts.

The issue presently in conflict among the circuit courts, as well as in the district courts, is whether the FDCPA applies to non-consensual, non-credit transactions such as those involving payment by worthless checks. In common parlance, the existence of a debt connotes the existence of credit. They are two sides of the same coin. And though there is no suggestion Congress

intended to supplant the common connotation of debt, the lower courts have construed the FDCPA's definition of "debt" with very little consistency. This inconsistency is evidenced by and may continue to flow from the divergent views thus far taken by the courts of appeal for the Third, Seventh, Ninth, and Eleventh Circuits.

In *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (3d Cir. 1987), HBO and affiliated cable television companies sent letters to some 5,600 individuals believed to be pirating cable televisions signals without paying the service fee. The letters identified the recipients as potential civil defendants and, among other things, demanded that they pay $300. Several recipients of such letters who had not pirated cable signals sued, claiming that the attempts by the cable companies to collect $300 violated the FDCPA. The issue on review was whether the cable companies, by demanding payment of $300, "were seeking to collect a 'debt' within the meaning of the" FDCPA. *Id.*, at 1164. Construing the FDCPA definition of "debt" as the obligation to pay arising out of a consumer credit transaction, the Third Circuit concluded that unpaid service fees for pirated cable signals did not constitute an FDCPA debt. The court focused on the statute's term "transaction," and found

> that the type of transaction which may give rise to a "debt" as defined in the FDCPA, is the same type of transaction as is dealt with in all other subchapters of the Consumer Credit Protection Act, *i.e., one involving the offer or extension of credit* to a consumer. Specifically it is a transaction in which a consumer is offered or extended the right to acquire "money, property, insurance,

> or services" which are "primarily for household purposes" *and to defer payment.*

Id. at 1168-69 (emphasis added). Here, although the use of the HBO signals was clearly for household purposes, there was no consensual credit transaction giving rise to the obligations pursued by HBO, and thus no "debt."

In *Bass v. Stolper, Koritzinsky, Brewster & Neider*, 111 F.3d 1322 (7th Cir. 1997), the defendant law firm sought to collect on a dishonored check, and the plaintiff sued claiming that the law firm had violated the FDCPA. At issue was whether a dishonored check constitutes a "debt" – i.e., "an obligation to pay arising out of a transaction" – within the meaning of the FDCPA. To answer this question, the *Bass* majority, like the Third Circuit in *Zimmerman*, considered whether the "transaction" must be a credit transaction. Disagreeing with *Zimmerman*, and thus creating a conflict in the circuit courts, the *Bass* majority held that "to the extent that the Zimmerman court creates a requirement that only credit-based transactions constitute 'debts' under the FDCPA, we must respectfully part ways." *Id.*, at 1326. The *Bass* majority rejected the credit requirement recognized in *Zimmerman*, instead concluding that it was "powerless to rewrite the Act's definition of 'debt' by restricting the ordinary meaning of the term 'transaction' to 'credit transaction.' " *Id.* In other words, because the term "transaction" was not expressly qualified by the language of the statute, the *Bass* majority believed it was "prohibited from reading

into clear statutory language a restriction that Congress itself did not include." *Id.*[1]

In the present case, *Charles v. Lundgren & Associates*, 119 F.3d 739 (9th Cir. 1997), the Ninth Circuit simply adopted the *Bass* opinion without independent analysis. The court concluded:

> Because we have the benefit of the Seventh Circuit's cogent analysis, we will not replow plowed ground. Instead, we adopt the reasoning of the Seventh Circuit and conclude, as it did, that the FDCPA's application is not limited to collection of debts arising out of the offer or extension of credit. A dishonored check constitutes an FDCPA "debt," and therefore the FDCPA prohibits check collectors from using abusive practices.

Id., at 742.

Most recently, in *Brown v. Budget Rent-a-Car Systems, Inc.*, 119 F.3d 922 (11th Cir. 1997), the court considered whether money allegedly owed under a car rental contract for the cost of repairs, loss of use, and administrative fees constituted a "debt" within the meaning of the FDCPA. Like the Ninth Circuit, the Eleventh Circuit simply adopted the Seventh Circuit's opinion in *Bass* with scant analysis.

---

[1] Extended logically to its conclusion, this refusal to qualify the word "transaction" in any manner would extend FDCPA protection to obligations arising from *any* transaction, including fraudulent and criminal transactions. The *Bass* majority conceded this. 111 F.3d at 1329-30.

> The [Seventh Circuit] commented on the broad definition of debt in the Act and reasoned that "as long as the transaction creates an obligation to pay, a debt is created." We agree with that reading of the statute. Extension of credit is not a prerequisite to the existence of a debt covered by the FDCPA.

119 F.3d at 924.

In sum, there presently exists a split of authority between the Third Circuit on one hand, and the Seventh, Ninth, and Eleventh Circuits on the other hand, concerning whether the FDCPA – and particularly the definition of "debt" – includes transactions that do not involve the consensual extension of credit. The confusion is deepened, moreover, by the Seventh Circuit's (and thus also the Ninth and Eleventh Circuits') inconsistent view that FDCPA transactions giving rise to "debts" must be consensual, but need not involve a knowing and voluntary extension of credit. In light of the circuit court conflict, definitive judicial guidance is needed in this area of the law, not only for the growing number of federal courts being confronted by the issue, but also for millions of consumers and merchants who deal with checks, and are most affected by the confusion. The correct resolution of the conflict, as shown below, lies in understanding that by using the term "transaction" in its definition of "debt," Congress implicitly required an agreement – i.e., consent – by the transacting parties that a "debt" would be created by that transaction. An FDCPA protected debt can arise only when there is a knowing and voluntary extension of credit. There was no such knowing and voluntary extension in this case.

Because of this conflict among lower federal courts, this Court should schedule this matter for briefing and oral argument pursuant to Rule 16 of the Rules of the Supreme Court of the United States.

II. A "DEBT" EXISTS WITHIN THE MEANING OF THE FDCPA ONLY WHEN THERE HAS BEEN A KNOWING AND VOLUNTARY EXTENSION OF CREDIT.

A. ALL CIRCUITS AGREE ON THE CONSENSUALITY REQUIREMENT.

The *Bass* majority did not believe it proper to "restrict[ ] the ordinary meaning of the term 'transaction' to 'credit transaction.' " Indeed, the *Bass* majority stated it was "powerless" to modify the word "transaction" at all. 111 F.3d at 1326. Yet in spite of this professed impotence, it is clear from the *Bass* majority's opinion that it felt empowered to imply other restrictions not expressed in the statute. In its discussion of the *Zimmerman* case, the *Bass* majority reasoned "that pirating television signals did not amount to a 'transaction' at all," because "[i]nstead of being a *consensual* transaction for the purchase of consumer goods or services, the alleged conduct in Zimmerman was theft." 111 F.3d at 1326 (emphasis added). The court went on to say that

> although a thief undoubtedly has an obligation to pay for the goods or services he steals, the FDCPA limits its reach to those obligations to pay arising from *consensual* transactions, where the parties *negotiate or contract* for consumer-related goods or services.

Id. (emphasis added).

The *Bass* majority's analysis highlights two truths. First, Congress's intended meaning for the term "transaction" is not, as the *Bass* majority contends, clear from the face of the statute. For example, to distinguish *Bass* from *Zimmerman*, it was necessary for the *Bass* majority to construe, interpret, and imply that an FDCPA-covered transaction must be *consensual*. This construction, in spite of the *Bass* majority's stated unwillingness to qualify the word "transaction," amounted to no more than the construing, interpreting, and implying that led the *Zimmerman* court to conclude that FDCPA-covered transactions must be *credit* transactions. In both cases, the courts went outside the language of the statute and relied on common connotations to determine the "ordinary meaning" of transaction (and hence "debt") as used in the FDCPA.

Second, and more importantly, there is one critical point of agreement among the conflicting circuit courts: a "transaction" within the meaning of the FDCPA must be based on the consent of the parties, through negotiation or contract. The *Zimmerman* court reasoned that "the concept of a 'transaction' is broader than that of a *contract*" because it also "may describe *negotiations* which have been only partly brought to a conclusion." 834 F.2d at 1168 (emphasis added). From this predicate – that a "transaction" results from a contract or negotiation – the *Zimmerman* court reached the conclusion that "the type of transaction which may give rise to a 'debt' as defined in the FDCPA, is . . . one involving the offer or extension of credit to a consumer." *Id.* Because the obligation to pay for pirated television signals in *Zimmerman* did not arise from a contract or negotiation, the court found that the FDCPA did not apply.

The *Bass* majority acknowledged the very same predicate: "the FDCPA limits its reach to those obligations to

pay arising from *consensual* transactions, where parties *negotiate* or *contract* for consumer-related goods or services." 111 F.3d at 1326 (emphasis added). This reasoning is significant because it demonstrates agreement among the circuit courts that the only "transactions" covered by the FDCPA are those in which the parties negotiate or contract by mutual consent. However, unlike the *Zimmerman* court, the *Bass* majority failed to draw the logical and necessary conclusion that a protected obligation to pay arising from a contract or negotiation necessarily must involve the knowing and voluntary extension of credit; i.e., an agreement that an obligation to pay would exist at the conclusion of the transaction, rather than be extinguished during the transaction. The Ninth Circuit here, and the Eleventh Circuit in *Brown*, have compounded this failure and extended it in their own circuits. And because of this failure, the Ninth Circuit erroneously held that Charles' obligation to pay on her dishonored check was covered by the FDCPA.

B. IN SPITE OF REQUIRING CONSENSUALITY IN FDCPA TRANSACTIONS, THE *BASS* MAJORITY, AND THUS THE LOWER COURT HERE, FOUND A "DEBT" WHERE NO CONSENT EXISTED.

The *Bass* majority failed to recognize that for a transaction to be consensual within the meaning of the FDCPA – i.e., based on a contract or negotiation – both parties must agree that one will owe the other money when the exchange is concluded. The tortious transaction in *Zimmerman* – the theft of cable television signals – was not

consensual because, even though the thief has an obligation to pay monies for household or "consumer" purposes, the cable companies did not negotiate or contract to be owed money. 834 F.2d at 1168. Similarly, in *Shorts v. Palmer*, 155 F.R.D. 172, 175-76 (S.D. Ohio 1994), a case relied upon by the *Bass* majority, the court held that the "obligation to pay for shoplifted merchandise did not arise from a 'debt' under the FDCPA because 'plaintiff has never had a contractual arrangement of any kind with any of the defendants.' " 111 F.3d at 1326. Again, the merchants were owed money for the shoplifted merchandise intended for consumer purposes, but they never *agreed* to be owed money.

The obligee on a dishonored check, like the obligee in the case of pirated cable signals or shoplifted merchandise, does not become such as a result of a consensual extension of credit. In all three cases, the obligor obtains consumer goods or services and, *unilaterally*, creates an involuntary obligee who must take steps to collect the value of the goods or services, steps it never bargained for and never contemplated. In none of the three cases does the obligee contract or negotiate to be owed money. In none of the three cases does the obligee consent to extend credit, or bargain to obtain benefits customarily provided in exchange for a credit risk, such as interest. Thus, the cable companies in *Zimmerman*, the merchants in *Shorts*, and the restaurant patronized by Charles here were forced into the position of obligee, and ultimately debt collector, against their will. Moreover, in the case of a dishonored check, the check writer not only creates an involuntary obligee, but frequently writes the check knowingly and fraudulently. Thus, because the obligation

to pay on a dishonored check does not arise from a consensual extension of credit, it does not arise from an FDCPA "transaction."

After implicitly acknowledging that a *consensual* transaction must be one in which there is a voluntary obligee, the *Bass* majority nevertheless failed to draw the necessary conclusion that it is only in a credit transaction that voluntary obligees are created. In any consensual transactions *not* involving extension of credit, the obligation to pay – i.e., the debt – is extinguished at the moment of exchange. Unless credit is extended, there should never be an obligation to make additional payments, and without an obligation to make additional payments there would never be any efforts to collect that could be governed by the FDCPA. Thus, for a transaction to be both *consensual* and one which could give rise to collection efforts governed by the FDCPA, the transaction necessarily must be a *credit* transaction.

Because attempts to collect on a dishonored check should not be governed by the FDCPA, this court should reverse this error in the Seventh and Ninth Circuit panels, and grant CheckRite's petition for writ of certiorari.

III. THE SEVENTH AND NINTH CIRCUIT DECISIONS, IF ALLOWED TO STAND, WILL HAVE THE UNINTENDED EFFECT OF PREEMPTING STATE BAD CHECK STATUTES.

This Court should grant certiorari and reverse the decision of the Ninth Circuit (and by implication the decisions of the Seventh and Eleventh Circuits as well) for an additional reason: if the FDCPA is expanded to

include obligations on dishonored checks, it will preempt statutes regulating the collection of dishonored checks which exist in most or all of the several states. Inevitable inconsistencies between the FDCPA and state bad check statutes will create preemption litigation in every federal jurisdiction. Under the circumstances, Congress reasonably could not have intended this result.

For example, a unique feature of the FDCPA is its "30 day Validation Notice" requirement. 15 U.S.C. § 1692g(a)(4). *See* Appendix. This requires debt collectors to advise debtors they may contest the claimed obligation within 30 days. Yet many state bad check statutes create evidentiary presumptions that arise in fewer than 30 days. An applicable statute in this case, for instance, is Arizona Revised Statutes section 12-671, permitting a presumption of fraudulent intent when bad checks are not made good within 12 days of notice of dishonor. *See* Appendix. If the Ninth and Seventh Circuits are upheld, courts will have to answer preemption questions such as whether the presumption of fraud after 12 days in section 12-671(c) is inconsistent with sections 1692g(c) and 1692g(a)(4) of the FDCPA, which provide that a consumer's failure to dispute a debt is not an admission of liability, and permit a debtor 30 days to dispute a debt. If so, would a debt collector still be able to bring an action in Arizona if the consumer fails to pay the bad check within the 12 day period? Although this Arizona statute highlights one potential preemption issue, the notion that someone who has signed a check be given an additional 30 days to dispute whether he or she owes it is also at odds with most state bad check collection schemes, which

generally imply criminal intent to those who do not quickly make good on their checks.

It is conceivable, of course, that Congress has chosen to encroach on and preempt an area of law, such as bad check collection, that is traditionally reserved to state regulation. Congress has done so in other contexts. But it is not reasonable to believe that Congress would consciously preempt state bad check laws without expressly saying so. Had Congress intended the FDCPA to preempt state bad check laws, it would not have left the very question of preemption to be determined by future litigants' technical interpretations of FDCPA terms like "debt" and "transaction." By the same token, if Congress had intended the FDCPA to preempt state bad check laws, it would not have done so in such a vague manner that fundamental questions would have to be resolved through litigation.

Congress is familiar enough with the litigation side effects of federal preemption that if it had intended the FDCPA to preempt state bad check laws, it would have said so. The lack of such language is another reason why this Court should grant this petition for writ of certiorari, reverse the Seventh, Ninth, and Eleventh Circuits, and prevent unintended preemption litigation by leaving the regulation of bad check collection to the individual state legislatures.

IV. CONCLUSION

The circuit court conflict results from the Seventh and consequently the Ninth and Eleventh Circuits' failure to recognize that *consensual* transactions giving rise to

debts within the meaning of the FDCPA necessarily must be *credit* transactions. Because the obligation on a dishonored check does not derive from a consensual credit transaction, and because the rationale of the Seventh Circuit threatens to unsettle the bad check collection procedures separately established by each of the 50 states, this Court should grant CheckRite's petition for writ of certiorari and either overturn the Ninth Circuit's erroneous order summarily, or order full briefing and a hearing pursuant to Rule 16 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

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October 10, 1997

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHAROLYN CHARLES, on behalf of herself and all others similarly situated, *Plaintiff-counter-defendant-Appellant,* v. LUNDGREN & ASSOCIATES, P.C.; ALVIN R. LUNDGREN; *Defendants-Appellees,* CHECK RITE LTD., *Defendant-counter-claimant-Appellee.*	No. 96-15995 D.C. No. CV-95-02263-PGR OPINION

Appeal from the United States District court
for the District of Arizona
Paul G. Rosenblatt, District Judge, Presiding

Argued and submitted
June 12, 1997 – San Francisco, California

Filed July 8, 1997

Before: Alfred T. Goodwin, Dorothy W. Nelson, and Stephen S. Trott, Circuit Judges.

Opinion by Judge Trott

SUMMARY

Business Law/Creditors and Debtors

The court of appeals reversed a judgment of the district court. The court held that a third-party debt collector's efforts on a dishonored check are governed by the Fair Debt Collection Practices Act (FDCPA).

Appellant Sharolyn Charles's check to a restaurant for $17.93 was dishonored for insufficient funds. The restaurant forwarded the returned check to appellee Check Rite, a debt collector. Check Rite referred the matter to appellant Lundgren & Associates, a law firm.

Charles sued Check Rite and Lundgren seeking class certification and alleging abusive check collecting practices in violation of the FDCPA. The district court granted Check Rite's and Lundgren's motion to dismiss, ruling that the FDCPA did not apply to their actions. The court concluded that the FDCPA applies only to debts arising out of an offer or extension of credit and that dishonored checks therefore are not "debts" within the statute's meaning. Charles appealed.

[1] The Seventh Circuit has analyzed the scope of the FDCPA. The FDCPA defines "debt" as any obligation of a consumer to pay money arising out of a transaction. Noting that there is no language in that definition or the FDCPA that mentions, let alone requires, that the debt arise from an extension of credit, the Seventh Circuit concluded that a check evidences the drawer's obligation to pay for the purchases made with the check, and should the check be dishonored, the payment obligation remains.

The court rejected the invitation to read the undefined term "transaction" restrictively as a "credit transaction."

[2] The Seventh Circuit reviewed the legislative history, concluding that it served to reinforce a finding that non-credit transactions are included in the FDCPA's purview.

[3] The Seventh Circuit properly concluded that the FDCPA's application is not limited to collection of debts arising out of the offer or extensions of credit. A dishonored check constitutes an FDCPA "debt," and therefore the FDCPA prohibits check collectors from using abusive practices.

COUNSEL

Michael C. Shaw, Bybee & Shaw, Tempe, Arizona, and Daniel A. Edelman, Edelman & Combs, Chicago, Illinois, for the plaintiff-appellant.

Mark O. Morris, Snell & Wilmer, Salt Lake City, Utah, and Alvin R. Lundgren, Lundgren & Associates, Rancho Cordova, California, for the defendants-appellees.

Michael B. Bennett, Bennett Law Offices, Salt Lake City, Utah, for amicus curiae ShopKo Stores, Inc. and Mrs. Fields Original Cookies, Inc.

Ernest J. Isenstadt, Assistant General Counsel, Federal Trade Commission, Washington, D.C., for amicus curiae Federal Trade Commission.

Joanne S. Faulkner, New Haven, Connecticut, for amicus curiae National Association of Consumer Advocates, Inc. and Consumer Law Center of the South.

OPINION

TROTT, Circuit Judge:

Overview

This case presents an issue of first impression in this circuit: whether a third-party debt collector's efforts to collect a dishonored check are governed by the Fair Debt Collection Practices Act ("FDCPA" or "the Act"), 15 U.S.C. §§ 1692-1692o. The district court ruled that the FDCPA does not apply to efforts to collect a dishonored check, because a dishonored check is not a "debt" under the FDCPA.

The only federal court of appeals that has considered this question is the Seventh Circuit. In a well-reasoned and persuasive opinion, that court recently held that a dishonored check is a "debt" under the FDCPA. *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir.1997). We agree with its conclusion that, because "an offer or extension of credit is not required for a payment obligation to constitute a 'debt' under the FDCPA," *id.* at 1326, the FDCPA governs the collection of dishonored checks. We therefore reverse.

Background

Sharolyn Charles ("Plaintiff") brought suit against Check Rite Ltd., Alvin R. Lundgren, and Lundgren & Associates (collectively, "Defendants"), alleging that Defendants' actions in attempting to collect a dishonored check violated the FDCPA. Charles wrote a check in the amount of $17.93 to a Poncho's Restaurant as payment for a meal on July 4, 1996. The check was dishonored for

insufficient funds. Poncho's forwarded the returned check to Check Rite for collection. On July 19, Check Rite sent a letter to Charles, stating that "[t]his is an attempt to collect a debt" and requesting total payment of $42.93 – the amount of the check plus a service charge of $25.00. On August 7, Check Rite sent a second letter, requesting payment of $42.93 and advising Charles that failure to pay the total amount due might result in additional liability for damages and attorneys' fees, estimated at $242.93.

Check Rite subsequently referred the matter to the law firm of Lundgren & Associates for collection. On September 8, Lundgren sent a letter to Charles offering to settle within ten days for a total amount of $127.93 – the amount of the check plus a settlement amount of $110.00. Lundgren further advised that they had made no decision to file suit, that they could later decide to do so, and that Charles's potential liability was $317.93. Charles immediately sent to Lundgren a money order in the amount of $17.93. On September 13, Lundgren sent a second letter, repeating the settlement offer made in the September 8 letter. Lundgren then returned Charles' payment, on September 14, declining to accept it as payment in full and repeating the settlement offer. On September 19, Lundgren sent a fourth letter to Charles, repeating the settlement offer.

On October 15, Charles filed a suit against Defendants, seeking certification of her suit as a class action and alleging violations of the FDCPA, 15 U.S.C. §§ 1692e, 1692f, 1692g. The alleged violations included making false representations, seeking to collect more money than

required by state law to discharge the debt, and threatening litigation without intending to pursue it. Defendants moved to dismiss for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6), on the ground that an attempt to collect a dishonored check is not an attempt to collect a "debt" governed by the FDCPA. The district court granted the Defendants' motion, holding that the FDCPA did not apply to Defendants' actions. The district court concluded that the FDCPA applies only to debts arising out of an offer or extension of credit and that dishonored checks therefore are not "debts" within the statute's meaning. Plaintiff appeals.[1] We review de novo a dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Lewis v. Telephone Employees Credit Union*, 87 F.3d 1537, 1545 (9th Cir.1996).

Discussion

In a factually similar situation, our colleagues on the Seventh Circuit recently confronted the same question of whether a dishonored check is an FDCPA "debt." *See Bass*, 111 F.3d 1322. Unfortunately, the district court did not have the benefit of *Bass* before it ruled.

[1] In *Bass*, the Seventh Circuit ably analyzed the scope of the FDCPA and responded to the same arguments presented by the Defendants here. To determine whether a dishonored check constitutes an FDCPA debt,

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[1] We grant the Defendants' Motion to Strike the Plaintiff's Appendix. We also grant the Motion for Leave to File an Amicus Brief submitted by the National Association of Consumer Advocates, Inc. and the Consumer Law Center of the South.

the Seventh Circuit began with the text of the FDCPA itself. The FDCPA defines "debt" as:

> *any obligation* or alleged obligation *of a consumer to pay money arising out of a transaction* in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

15 U.S.C. § 1692a(5) (emphasis added). Noting that "we see no language in the Act's definition of 'debt' (or any other section of the Act) that mentions, let alone requires, that the debt arise from an extension of credit," *Bass*, 111 F.3d at 1325, the Seventh Circuit concluded: "We harbor no doubt that a check evidences the drawer's obligation to pay for the purchases made with the check, and should the check be dishonored, the payment obligation remains." *Id.* The court also rejected the appellants' invitation to read the undefined term "transaction" restrictively as a "credit transaction." *Id.* at 1325-26.

[2] Although resort to extrinsic sources was unnecessary in view of the clear language of the Act, the Seventh Circuit reviewed the legislative history, concluding that it "serves to reinforce a finding that non-credit transactions are included in the Act's purview." *Id.* at 1327. Noting that earlier versions of the Act included a credit extension requirement and that the applicability of the Act to dishonored checks was acknowledged during the House and Senate hearings, the Seventh Circuit aptly concluded: "In short, Congress was aware of discord on whether 'debt' should be defined restrictively to include only credit transactions, but rejected this restriction in the

text it adopted." *Id.* Finally, the court pointed to "an unequivocal statement of the drafters' intent on this issue: '[T]he committee intends that the term "debt" include consumer obligations paid by check or other non-credit consumer obligations.' " *Id.* (quoting H.R.Rep. No. 95-131, 95th Cong., 1st Sess. 4 (1977)).

The Seventh Circuit also rejected the appellants' reliance on the Act's codification as an amendment to the Consumer Credit Protection Act ("CCPA"), 15 U.S.C. § 1601 et seq. Noting that the Act's placement in the CCPA is "at best a weak tool in the search for Congressional intent," the court found the connection "unpersuasive in light of the continuing expansion of the CCPA's protective landscape." *Id.* at 1328. Finally, the *Bass* court rejected the suggestion that "any dishonored check should fall outside the act pursuant to a judicially created fraud exception." *Id.* at 1329.

We find the Seventh Circuit's reasoning to be sound and thus hold that a dishonored check is a "debt" within the meaning of the FDCPA. Our decision in *Bloom v. I.C. System, Inc.*, 972 F.2d 1067 (9th Cir.1992), does not require a different result. Although in *Bloom* we turned to the Truth in Lending Act's ("TILA") definition of "consumer loan" to shed light on the meaning of that phrase as used in the FDCPA, *id.* at 1068-69, we did not suggest that TILA definitions should be used to restrict broader FDCPA definitions. Nor did we suggest that a term must be interpreted consistently throughout the CCPA when separate subchapters use the term differently. Like the Seventh Circuit, we find the suggestion "that we graft a credit requirement, either from the location of the FDCPA

in the United States Code or from the independent codified purpose of the Truth in Lending Act, untenable." *Bass*, 111 F.3d at 1329.

[3] Because we have the benefit of the Seventh Circuit's cogent analysis, we will not replow plowed ground. Instead, we adopt the reasoning of the Seventh Circuit and conclude, as it did, that the FDCPA's application is not limited to collection of debts arising out of the offer or extension of credit. A dishonored check constitutes an FDCPA "debt," and therefore the FDCPA prohibits check collectors from using abusive practices. We reverse the district court's dismissal of Plaintiff's complaint for failure to state a claim and remand for further proceedings.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 96-15995
CT/AG#: CV-95-02263-PGR

SHAROLYN CHARLES, on behalf of herself and all others similarly situated

Plaintiff-counter-defendant-Appellant

v.

LUNDGREN & ASSOCIATES, P.C.; ALVIN R. LUNDGREN;

Defendants-Appellees

CHECK RITE LTD.

Defendant-counter-claimant-Appellee

(Filed Sept. 16, 1977)

APPEAL FROM the United States District Court for the District of Arizona (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED AND REMANDED.

Filed and entered July 8, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SHAROLYN CHARLES, Plaintiff, vs. CHECKRITE, LTD., et al., Defendants.	No. CIV 95-2263 PHX PGR ORDER (Filed May 9, 1996)

Among the motions pending before the Court are defendants Lundgren and Associates, P.C. and Alvin R. Lundgren's (collectively Lundgren) Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted (FRCP 12(b)(6)), filed December 14, 1995[1], and the plaintiff's Motion to Dismiss Counterclaim, filed November 29, 1995. Having considered the parties' memoranda and the oral argument of counsel, the Court finds that this entire action should be dismissed.

Since the plaintiff's complaint alleges only a claim under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 et seq., arising from the defendants' efforts to collect on a non-sufficient funds (NSF) check that the plaintiff wrote to a restaurant in payment for a meal, the primary issue before the Court as to Lundgren's motion to dismiss, and the only issue in that motion that the Court need decide given its ruling, is whether the defendants' collection efforts fall within the purview of the

[1] Defendant Checkrite, Ltd. filed a joinder in the motion on April 5, 1996.

FDCPA. For purposes of Lundgren's motion to dismiss, the Court accepts the definition of a transaction giving rise to a FDCPA-covered debt set forth by the Third Circuit in *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (3rd Cir. 1987):

> We find that the type of transaction which may give rise to a "debt" as defined in the FDCPA, is the same type of transaction as is dealt with in all other subchapters of the Consumer Credit Protection Act, *i.e.*, one involving the offer or extension of credit to a consumer. Specifically it is a transaction in which a consumer is offered or extended the right to acquire "money, property, insurance, or services" which are "primarily for household purposes" and to defer payment.

Zimmerman, 834 F.2d at 1168-69. While the Court recognizes that there is a split of authority on the issue of whether a NSF check can constitute a FDCPA-covered debt, none of the authority cited to the Court constitutes precedent binding upon it. The Court disagrees with the plaintiff's contention that the FDCPA governs this action because a merchant who takes a check extends credit until the check clears. The court concludes instead that the FDCPA does not pertain to this action because the acceptance of a check in payment for consumer goods does not constitute the extension of credit as contemplated by the FDCPA because there is no agreed-upon deferral of payment. Under the Uniform Commercial Code as adopted in Arizona, a check is a negotiable instrument which may immediately be presented for payment; the fact that as a practical matter payment may be delayed due to check processing procedures does not constituted [sic] an

extension of credit.[2] *Cf. Roberts v. WalMart Stores, Inc.*, 736 F.Supp. 1527, 1529-30 (M.D.Mo. 1990) ("Since plaintiffs' check was negotiable upon execution, defendant did not grant plaintiffs any right to purchase merchandise and defer payment for it. Although a delay in payment of the check may be necessary due to technology which does not currently allow for the immediate processing of a check, defendant maintained the right to present the check to the drawee immediately for payment.")

Since the plaintiff's complaint is promised [sic] upon a NSF check being a FDCPA-covered debt and the Court has found that such a check falls outside the protection of the FDCPA, the Court concludes that there is no basis to certify a class of plaintiffs as requested in Plaintiff's Motion for Class Certification.

Although the plaintiff argues that defendant Check-Rite's counterclaim on the underlying debt must be dismissed because it is merely a permissive counterclaim with no independent jurisdictional basis, the Court need not resolve the compulsory/permissive counterclaim issue because, given its dismissal of the plaintiff's complaint, the Court declines to exercise supplemental jurisdiction over the state law claims in the counterclaim pursuant to the discretion granted it by 28 U.S.C. § 1367(c)(3).[3] Therefore,

---

[2] It is undisputed in this case that the plaintiff did not postdate her check and did not request the restaurant to delay the cashing of her check.

[3] It is undisputed tht the amount in controversy in the counterclaim is less than the $50,000 mandated by 28 U.S.C. § 1332(a).

It IS ORDERED that defendants Lundgren and Associates, P.C. and Alvin R. Lundgren's Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted (FRCP 12(b)(6)) (doc. #8-1) is granted and that the complaint is dismissed without leave to amend.

IT IS FURTHER ORDERED that the plaintiff's Motion to Dismiss Counterclaim (doc. #4) is granted to the extent that the Court declines to exercise supplemental jurisdiction over defendant Checkrite, Ltd.'s counterclaim.

IT IS FURTHER ORDERED that defendants Lundgren and Associates, P.C. and Alvin R. Lundgren's Motion for Sanctions (doc. #8-2) is deemed withdrawn.[4]

IT IS FURTHER ORDERED that Plaintiff[']s Motion for Class Certification (doc. #23) is denied.

IT IS FURTHER ORDERED that Defendants' Motion to Stay Certification of the Class Action (doc. #28) is denied as moot.

IT IS FURTHER ORDERED that defendants' Motion for Leave to File Overlength Memorandum (doc. #37) is granted.

IT IS FURTHER ORDERED that Defendant Lundgren & Associates, P.C.'s Motion to Strike (doc. #42) is denied.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter a judgment dismissing this action in its entirety.

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[4] Defendant Alvin Lundgren orally withdrew the motion at the hearing on April 29, 1996.

Dated this 8th day of May ___, 1996.

/s/ Paul G. Rosenblatt
Paul G. Rosenblatt
United States
District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHAROLYN CHARLES, on Behalf of Herself and all Others Similarly Situated Plaintiff-Counter-Defendant-Appellant v. LUNDGREN & ASSOCIATES, P.C.; ALVIN R. LUNDGREN; Defendants-Appellees CHECK RITE LTD. Defendant-Counter-Claimant-Appellee	No. 96-15995 D.C. No. CV-95-02263-PGR ORDER (Filed Aug. 8, 1977)

Before: GOODWIN, D.W. NELSON, and TROTT, Circuit Judges.

The petition for rehearing is DENIED.

DEBT COLLECTION

§ 1692g. Validation of debts

Notice of debt; contents

(a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing –

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

Disputed debts

(b) If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

Admission of liability

(c) The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

(Pub.L. 90-321, Title VIII, § 809, as added Pub.L. 95-109, Sept. 20, 1977, 91 Stat. 879.)

ARTICLE 8. INSUFFICIENT FUNDS CHECK

Article 8, consisting of § 12-671, was added by Laws 1973, Ch. 102, § 4, effective August 8, 1973.

§ 12-671. Drawing check or draft on no account or insufficient account with intent to defraud; civil action; definition of credit; prima facie evidence

A. A person who, for himself or for another, wilfully with intent to defraud, makes, draws, utters or delivers to another person or persons a check or draft on a bank or depositary for payment of money, knowing at the time of such making, drawing, uttering or delivery, that he or his principal does not have an account or does not have sufficient funds in, or credit with, such bank or depositary to meet the check or draft in full upon presentation, shall be liable to the holder of such check or draft for the amount of such check or draft together with costs and reasonable attorney's fees as allowed by the court on the basis of time and effort expended by such attorney on behalf of plaintiff.

B. The word "credit" as used in this section shall be construed to be an express agreement with the bank or depositary for payment of the check or draft.

C. Proof that at the time of presentment, the maker, issuer or drawer did not have sufficient funds with the bank or depositary, and that he failed within twelve days after receiving notice of nonpayment or dishonor to pay the check or draft is prima facie evidence of intent to defraud.

D. Where a check, draft or other is protested, on the ground of insufficiency of funds or credit, the notice of formal protest thereof shall be admissible as proof of presentation, nonpayment and protest and shall be prima facie evidence of the insufficiency of funds or credit with the bank or depositary, or person, or firm or corporation.

E. "Notice", as used in this section, means notice given to the person entitled thereto, either in person, or in writing. Such notice in writing shall be given by registered or certified mail, return receipt requested, and postage prepaid, in the United States mail, to the person at his address as it appears on such check or draft.

F. Nothing in this section shall be applicable to any criminal case or affect eligibility or terms of probation.

Added by Laws 1973, Ch. 102, § 4.

(2)

Supreme Court, U.S.
FILED
NOV 10 1997
CLERK

No. 97-0658

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CHECKRITE LTD., INC.,

Petitioner,

v.

SHAROLYN CHARLES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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16 pp

QUESTION PRESENTED

1. Are collection efforts on a dishonored check an attempt to collect a "debt" as defined in the Fair Debt Collection Practices Act.

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STATEMENT OF THE CASE

On or about July 4, 1996, Sharolyn Charles wrote a check in the amount of $17.93 to Ponchos restaurant, for the purchase of a meal. Ms. Charles' bank dishonored the check for insufficient funds (Ms. Charles made a mistake in balancing her checkbook). Ponchos forwarded the check to CheckRite and asked it to pursue collection of the dishonored check. On or about July 19, 1995, CheckRite sent a letter to Ms. Charles requesting payment of the face amount of the check plus a $25.00 "service charge." On August 7, 1995, CheckRite sent another letter to Ms. Charles seeking payment.

After CheckRite failed in its collection efforts, CheckRite retained Alvin R. Lundgren of Lundgren & Associates, to continue collection efforts. On or about September 8, 1995, Lundgren sent a letter to Ms. Charles demanding payment of $127.93, consisting of the face amount of the dishonored check and a $110 "settlement amount." Immediately upon receipt of this letter, Ms. Charles forwarded a money order to Lundgren in the amount of $17.93, the full amount necessary for Ms. Charles to discharge her liability under Arizona law. Lundgren returned the money order to Ms. Charles and in several letters demanded full payment of the $127.93.

On October 19, 1995, Ms. Charles filed a class action complaint alleging that CheckRite and Lundgren violated various provisions of the Fair Debt Collection Practices Act ("FDCPA"). Shortly thereafter, CheckRite and Lundgren filed a Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(6), arguing that an attempt to collect a dishonored check did not constitute a debt under the FDCPA. On May 9, 1996, the United States District Court for the District of Arizona granted the motion.

Ms. Charles appealed to the United States Court of Appeals for the Ninth Circuit. On July 8, 1997, the Ninth Circuit reversed the District Court. In its opinion the court referred to *Bass v. Stolper, Koritzinsky, Brewster & Neider*, 111 F.3d 1322 (7th Cir. 1997) and adopted the rationale of the Seventh Circuit. CheckRite filed a petition for rehearing, which was denied on August 8, 1997. CheckRite now petitions this Court to review the order of the Ninth Circuit pursuant to 28 U.S.C. § 2101(c).

SUMMARY OF REASONS FOR DENYING WRIT

The question presented to and decided by the Court below is whether a dishonored check constitutes a "debt" as defined by the FDCPA. The Ninth Circuit's holding in the affirmative is entirely consistent with the only other pronouncement by a federal Court of Appeals to address the same question, the decision of the Seventh Circuit whose reasoning the Court below adopted. There is no conflict among the Circuit Courts with regard to this question.

The purported conflict among the Circuits claimed in the Petition arises from unexamined dicta in an early decision from the Third Circuit. This dicta, engrafting a credit component onto the statutory definition of a "debt," has been repudiated by the three Circuit Courts which have reviewed it and has yet to be considered by the Third Circuit in light of its rejection by its sister courts. There is no holding from a Court of Appeals which conflicts with the holding below, and the Petition therefore presents no basis meeting the exacting standard for granting certiorari by Rule 10 of this Court.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS WHETHER A DISHONORED CHECK IS A "DEBT" AS DEFINED BY THE FDCPA.

This Court has long reserved its discretionary grant of certiorari to the most compelling matters presented to it. *Layne v. Bowler Corp.*, 261 U.S. 387, 393 (1923) (grant of certiorari should be limited to cases where "there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.") This principle is now codified in Rule 10 of this Court, which, as applicable here, requires at a minimum that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." The Seventh and Ninth Circuits are the only Courts of Appeals which have addressed the dishonored check question decided below and have reached precisely the same conclusion.

The Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. regulates the conduct of "debt collectors" in collecting "debts" owed or allegedly owed by consumers. The FDCPA broadly prohibits unfair or unconscionable collection methods in connection with the collection of a debt. Since the FDCPA only regulates "debt" collection, the Act's definition of "debt" serves to limit the scope of the FDCPA. The Act defines "debt" as:

> *any obligation* or alleged obligation of a consumer *to pay money arising out of a transaction* in which the money, property, insurance or services which are the subject of the transaction are primarily for personal,

> family, or household purposes, whether or not such obligation has been reduced to judgment.

15 U.S.C. § 1692a(5) (emphasis added).

The first case to address whether a dishonored check is such a "debt" was *Bass v. Stolper, Koritzinsky, Brewster & Neider*, 111 F.3d 1322 (7th Cir. 1997). The appellant argued that the FDCPA was inapplicable because the transaction did not involve an offer or extension of credit. The court began its analysis by noting that the case turned on whether the payment obligation that arises from a dishonored check constituted a "debt" under the FDCPA. It then referred to the Act's definition of "debt" and determined that there was no language that mentioned or required that the debt arise from an extension of credit. *Id.* at 1325. In addition, it rejected appellant's argument that the word "transaction," as used in the definition of "debt," be read restrictively to be a "credit transaction." *Id.* Although the court did not find it necessary to refer to extrinsic sources, the court conducted a thorough analysis of the FDCPA's legislative history and determined that it "reinforce[d] a finding that non-credit transactions are included in the Act's purview." *Id.* at 1327. Therefore, the Seventh Circuit concluded that the FDCPA's definition of "debt" did not require the offer or extension of credit and held that a dishonored check is a "debt" under the FDCPA. *Id.* at 1329.

After the Seventh Circuit decided *Bass*, the Ninth Circuit was called upon to address the very same issue. In the present case, *Charles v. Lundgren & Associates*, 119 F.3d 739 (9th Cir. 1997), the Ninth Circuit referred to the Seventh Circuit's opinion with approval, and adopted the reasoning of *Bass*. *Id.* at 742. Similarly, in

Brown v. Budget Rent-a-Car Systems, Inc., 119 F.3d 922 (11th Cir. 1997), the Eleventh Circuit, in a case not involving a dishonored check, referred to the *Bass* decision with approval and held that the extension of credit was not a prerequisite to the existence of a debt covered by the FDCPA. *Id.* at 924.

CheckRite has referred this Court to one case, *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (3rd Cir. 1987), that it contends "holds" that the FDCPA does not apply to non-credit transactions. *Zimmerman* did not address the dishonored check question decided in *Bass* and *Charles*. In *Zimmerman*, defendants were attempting to prevent persons from illegally pirating television signals. In order to stop the practice, defendants sent letters to 5,600 individuals suspected of intercepting HBO programming without a subscription. The letters threatened litigation if the recipients did not agree to pay a $300 non-negotiable "settlement" figure. The court phrased the issue as "whether the defendant cable television companies, in demanding monetary compensation in settlement of asserted legal claims against persons whom the defendants accused of having illegally received microwave television signals, were seeking to collect a 'debt' within the meaning of the Fair Debt Collection Practices Act." *Id.* at 1164.

The court focused on the term "transaction" in the FDCPA definition of "debt" and concluded that pirating television signal did not constitute a transaction. *Id.* at 1167-68. The key element in the *Zimmerman* court's conclusion was the lack of any sort of consensual transaction by the parties involved—theft normally does not involve a "transaction" between the thief and the victim. After deciding the issue of the case, the court stated in *dicta*:

> We find that the type of transaction which may give rise to a "debt" as defined in the FDCPA, is the same type of transaction as is dealt with in all other subchapters of the Consumer Credit Protection Act, i.e., one involving the offer or extension of credit to a consumer. Specifically it is a transaction in which a consumer is offered or extended the right to acquire "money, property, insurance, or services" which are "primarily for household purposes" and to defer payment.

Id. at 1168-69. It is this language on which CheckRite hangs its argument. Specifically, CheckRite argues that this "holding" in *Zimmerman* creates a conflict among the circuits. However, its argument must fail.

The *Zimmerman* court was not asked to address whether a "debt" under the FDCPA required an offer or extension of credit. Rather, it was asked to consider whether the illegal interception of a signal involved a "transaction" as required under the Act's definition of "debt." It was only after concluding that the FDCPA did not apply because there was no consensual transaction that the court stated in *dicta* that a "debt" required the offer or extension of credit.

Since the *Zimmerman* court's statement was *dicta*, the Eleventh Circuit in *Brown* refused to follow the language that CheckRite now claims is the *Zimmerman* court's holding. *Brown*, 119 F.3d at 924, n. 1 (refusing to follow *Zimmerman* because it considered "the *Zimmerman* court's commentary on the credit-based nature of debt to be *dicta*."). In addition, the Seventh Circuit in *Bass* also refused to follow *Zimmerman* because it concluded that "the true basis for [the] decision in *Zimmerman* was the lack of any sort of consensual transaction." *Bass*, 111 F.3d at 1326. *Zimmerman* does not stand for the proposi-

tion that the term "debt" is to be defined in any manner different from that set forth in the FDCPA. Since the language CheckRite relies on is pure *dicta*, the Third Circuit is not in conflict with the other circuits. Therefore, its petition for writ of certiorari must be denied.

II.

THE NINTH CIRCUIT CORRECTLY DECIDED TO ADOPT THE *BASS* DECISION.

In the present case, the Ninth Circuit was faced with the issue of whether a dishonored check was an FDCPA "debt." Since the *Bass* court conducted a thorough analysis of the same issue, the Ninth Circuit refused to "replow plowed ground" and correctly decided to adopt the *Bass* decision. *Charles*, 119 F.3d at 742.

In *Bass*, the Seventh Circuit responded to the same arguments presented by CheckRite in the lower court. Like CheckRite, the appellants in *Bass* argued that an FDCPA "debt" required the offer or extension of credit. The *Bass* court responded to this argument by referring to the text of the FDCPA and its definition of "debt." The court concluded that nothing in the Act's definition of debt mentioned or required that the debt arise from an extension of credit. *Bass*, 111 F.3d at 1325. In addition, the court rejected the appellant's invitation to read the term "transaction" restrictively as a "credit transaction" because "the ordinary meaning of the term 'transaction' is a broad reference to many different types of business dealings between parties, and does not connote any specific form of payment." *Id.* at 1325.

Like CheckRite, the *Bass* appellants also argued that the legislative history of the FDCPA suggested that only

transactions involving the extension of credit were governed by the Act. However, the court determined that a review of the legislative history supported its holding. The *Bass* court noted that earlier versions of the Act included a credit extension requirement, and that this language was deleted from later drafts. *Id.* at 1327. In addition, the court reviewed the House and Senate hearings which revealed that several debaters acknowledged the applicability of the Act to dishonored checks. *Id.* at 1327 (citing Hearings Before the Subcommittee on Consumer Affairs of the House Comm. on Banking, Finance and Urban Affairs on H.R. 29, 95th Cong., 1st Sess. at 257-61 (1977). The court concluded "[i]n short, Congress was aware of discord on whether 'debt' should be defined restrictively to include only credit transactions, but rejected this restriction in the text it adopted." *Id.* at 1327. Lastly, the court pointed to "an unequivocal statement of the drafters' intent on this issue: '[T]he committee intends that the term "debt" include consumer obligations paid by check or other non-credit consumer obligations.'" *Id.* at 1327 (quoting H.R.Rep. No. 95-131, 95th Cong., 1st Sess. 4 (March 29, 1977)).

In the lower court, CheckRite unsuccessfully argued that the placement of the FDCPA as a subset of the Consumer Credit Protection Act ("CCPA") was determinative in finding that the FDCPA only applied to credit transactions. The *Bass* court also considered this argument and determined that "the Act's codification as an amendment to the CCPA is at best a weak tool in the search for Congressional intent" and that it was "insufficient to outweigh the contrary intent evidenced by the Act's legislative history." *Id.* at 1328. More importantly, the court noted that the appellant's arguments were

refuted by the "enlargement of the CCPA to include consumer protections in other financial arenas" involving neither credit nor consumers.[1] *Id.* at 1328. In addition, the *Bass* court refused to refer to the CCPA's purpose or definitions provisions because "[t]he FDCPA is a self-contained, functionally complete act housing its own purpose, prohibitions, definitions, enforcement procedures, and remedies. The FDCPA requires no cross reference to other titles or subchapters of the CCPA, nor is such cross reference necessary to either understand or apply the Act's provisions." *Id.* at 1329.

CheckRite raises one argument in its petition that the *Bass* court was not asked to consider. The *Bass* court concluded that the term "transaction" did not require an offer or extension of credit. CheckRite now argues that the *Bass* court failed to recognize that a *consensual* transaction requires both parties to agree that "one will owe the other money when the exchange is concluded." (Pet. 10). CheckRite essentially argues that the word "consensual" requires an offer or extension of credit. However, its attempt to once again restrict the statutory definition must fail.

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[1] The Consumer Credit Protection Act ("CCPA") is comprised of nine titles, some of which have no application to credit. For example, the Electronic Funds Transfer Act, 15 U.S.C. § 1693 *et seq.* ("EFTA"), is part of the CCPA. The EFTA, however, does not apply to credit transactions; it applies to transactions in which *cash* is transferred through electronic means. See §§ 1692a(1), (2), (6) and (7). Title III of the CCPA, 15 U.S.C. §§ 1671-1677 provides for restrictions on garnishment indexed to the federal minimum wage. A credit transaction is not necessary to trigger its applicability. The Consumer Leasing Act, 15 U.S.C. § 1667 *et seq.*, another provision of the CCPA, pertains to leases.

A "consensual transaction" does not require credit to be involved. It only requires that the parties knowingly and willingly negotiated or agreed for the exchange of goods and services. The definition CheckRite proposes would render a voluntary exchange of goods or services to be a non-consensual transaction merely because it does not involve credit. This completely defies logic. The term "consensual" should be given its ordinary meaning which is "in law, formed or existing by mere mutual consent." *Webster's New Universal Unabridged Dictionary* at 388 (2nd Ed. 1983). In common understanding, the purchase of goods with a check is a "transaction."

Moreover, a merchant who accepts payment by check understands that there is some risk of nonpayment. Even if the purchaser thinks that funds will be available when the check is presented, that belief may be erroneous. Checks bounce because of arithmetical errors, because incoming funds do not clear, and because checking accounts are subject to setoff and legal process. That is why the Uniform Commercial Code clarifies a check as a *conditional* payment. Uniform Commercial Code § 3-408 ("A check or other draft does not of itself operate as an assignment of funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until the drawee accepts it."). That is also why companies like CheckRite exist. In a very real sense, when a merchant takes a check, the customer still owes the merchant money.

CheckRite refers to *Zimmerman*, 834 F.2d at 1163, and *Shorts v. Palmer*, 155 F.R.D. 172, 175-76 (S.D. Ohio 1994) to support its argument that a "consensual transaction" requires an offer or extension of credit. In both cases, the courts held that even though an obligation to

pay for the pirated cabled television signal and shoplifted merchandise existed, it was not an FDCPA debt because there was no underlying "transaction." CheckRite argues that these cases stand for the proposition that an obligee must have agreed to extend credit for there to be an FDCPA debt. However, CheckRite completely misconstrues the cases. The courts in *Zimmerman* and *Shorts* held that there was no FDCPA debt because the parties never negotiated or contracted for the exchange of goods or services, not because the obligee never agreed to extend credit.

The Seventh Circuit conducted a sound and complete analysis of the same arguments presented in the instant case. The Ninth Circuit was correct in its decision to adopt the *Bass* opinion. Therefore, this Court should deny CheckRite's petition for writ of certiorari.

III.

ALLOWING THE SEVENTH AND NINTH CIRCUIT DECISIONS TO STAND WILL NOT HAVE THE UNINTENDED EFFECT OF PREEMPTING STATE BAD CHECK STATUTES.

CheckRite claims that allowing the Seventh and Ninth Circuit decisions to stand will have the unintended effect of preempting state statutes governing dishonored checks. (Pet. 12-13). It also argues that if Congress had intended to preempt state bad check laws, it would have expressly done so. The fact is, Congress did expressly provide for preemption of state laws. The FDCPA contains a provision providing that it "does not annul, alter, or affect, or exempt any person subject to the provision of this subchapter from comply with the laws of any

State with respect to debt collection practices, *except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.*" 15 U.S.C. § 1692n (emphasis added). Therefore, CheckRite's argument is moot.

In addition, CheckRite overly exaggerates the FDCPA's preemptive effect. Section 1692n narrowly provides for preemption "to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency." Requiring debt collectors to comply with the dictates of the FDCPA would not preempt state statutes governing, for example, the imposition of criminal liability for writing bad checks. Demanding that debt collectors such as CheckRite comply with the requirements of the FDCPA would not hinder in any way the prosecution of persons for writing bad checks. Moreover, it is readily possible to comply with both the FDCPA and statutes such as Arizona Revised Statutes § 12-761.

Since Congress expressly provided for preemption, and the FDCPA's preemptive effect is very narrow, CheckRite's petition for writ of certiorari must be denied.

CONCLUSION

The circuit courts have unanimously held that a dishonored check is a "debt" as defined and that an FDCPA debt does not require the offer or extension of credit. CheckRite's attempt to create an apparent "conflict" among the circuits must fail because it relies on pure *dicta*. The Seventh Circuit was correct in holding that an FDCPA debt does not require the extension of credit. Moreover, the Ninth Circuit correctly decided to adopt

the sound and thorough analysis of the Seventh Circuit. Lastly, the decisions of the these circuits will not have the unintended effect of preempting state bad check statutes. Accordingly, CheckRite's petition for writ of certiorari must be denied.

Respectfully submitted,

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